Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-962

SAM GREEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MIAMI REVIEW — 371-4853 — 377-3721

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SAM GREEN respectfully petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The Opinion of the Court of Appeals (App. A) is reported at 518 F.2d 496. No opinion was rendered in the United States District Court for the Southern District of Florida.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was entered on September 5, 1975 (App. B). A timely Petition for Rehearing was denied with Opinion on December 12, 1975 (App. C).

The jurisdiction of this Court is invoked pursuant to the provisions of Title 28 United States Code §1254(1).

QUESTIONS PRESENTED

I

MAY THE TRIAL COURT DENY AN AGGRIEVED PERSON AN EVIDENTIARY HEARING ON THE LEGALITY OF A PRIOR WIRETAP BY STRIKING ALL REFERENCES TO IT WHEN THE PRIOR WIRETAP WAS INCLUDED IN THE APPLICATION TO INTERCEPT THE WIRE COMMUNICATIONS INVOLVED HEREIN?

II

ASSUMING ARGUENDO IT WAS PROPER TO STRIKE ALL REFERENCE TO THE PRIOR WIRETAP, WAS THERE REMAINING PROBABLE CAUSE TO INSTALL A WIRETAP ON TELEPHONES AT THE RESIDENCE OF THE PETITIONER?

III

DO CONCLUSIONARY STATEMENTS OF THE INVESTIGATIVE OFFICER THAT OTHER INVESTIGATIVE PROCEDURES ARE INADEQUATE SATISFY THE REQUIREMENTS OF TITLE 18 UNITED STATES CODE §2518(1)(c)?

STATUTORY PROVISIONS INVOLVED

Title 18 United States Code

§2510

"As used in this chapter—
(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed."

§ 2518. Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or

oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities

or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

* * *

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, . . .

STATEMENT

A United States Grand Jury for the Southern District of Florida, returned a multi-count Indictment charging the petitioner, SAM GREEN, GERALD HAY KILGORE, and one other with violations of Title 18 United States Code §1952. After a guilty verdict, Green was sentenced to the custody of the Attorney General for a period of two years.

The only evidence offered in support of interstate activities were recordings of telephone conversations between Green in Florida, and Kilgore in California. These recordings were a result of a wiretap installed at the residence of Green pursuant to a court order.

The application to intercept wire communications incorporated by reference a separate affidavit of a Special Agent of the Federal Bureau of Investigation.[1] Both included with specificity a full and complete statement concerning a prior and concurrent wiretap on the telephones of Kilgore wherein both Kilgore in California and Green in Florida were intercepted.

Prior to trial, Green filed a motion to suppress the intercepted telephone communications pursuant to the provisions of Title 18 United States Code §2518(10)(a).

Since the Kilgore tap furnished a basis for the order authorizing the interception of wire communications at Green's residence, the Trial Court originally granted Green and Kilgore an evidentiary hearing to determine whether the Green tap was a result of illegally obtained information from the Kilgore tap. Upon learning that the Kilgore tap consisted of 800 reels of tape recordings and would fill approximately 10,000 pages of transcription, the Court reversed itself, struck all references to the Kilgore tap from the application and the incorporated F.B.I. Agent's affidavit, and ruled that there was sufficient probable cause remaining for the Green wiretap.

REASONS FOR GRANTING THE WRIT

We believe that authorizing the striking of information about prior wiretaps is in conflict with *United States vs. Wac*, 6 Cir. 1974, 498 F.2d 1227, and *United States vs. Bellosi*, D.C.Cir. 1974, 501 F.2d 833, and contrary to the principles of *United States vs. Giordano*, 1974, 416 U.S. 505.

[1]Both documents were presented to the Court.

The Opinion of the Court of Appeals has misinterpreted the provisions of Title 18 United States Code §2518(1)(b) and §2518(1)(e) regarding the information that must be furnished in an application to intercept communications.

The Opinion of the Court of Appeals has an irreconcilable conflict within itself.

This Court should resolve to what extent an investigative officer should demonstrate the lack of availability of other investigative techniques before seeking authorization to intercept communications electronically.

ARGUMENT

I

MAY THE TRIAL COURT DENY AN AGGRIEVED PERSON AN EVIDENTIARY HEARING ON THE LEGALITY OF A PRIOR WIRETAP BY STRIKING ALL REFERENCES TO IT WHEN THE PRIOR WIRETAP WAS INCLUDED IN THE APPLICATION TO INTERCEPT THE WIRE COMMUNICATIONS INVOLVED HEREIN?

In compliance with the provisions of Title 18 United States Code §2518(1)(b) and §2518(1)(e), the application to intercept oral communications included the following information:

"No previous application has been made to any Judge for authorization to intercept or for ap-

proval of interception of wire or oral communications involving any of the same known persons, facilities or places specified herein. However, a previous application was made to the Honorable A. Andrew Houk, United States District Judge, Central District of California for authorization to intercept wire communications of Gerald Hay Kilgore to and from telephone 213-985-8885, and other telephones utilized by Gerald Hay Kilgore, located at the J. K. Sports Journal, 19548 Victory Boulevard, North Hollywood, California, in connection with the investigation of possible violations of 18 U.S.C. 1084 and 1952 by Gerald Hay Kilgore. On the basis of said application, an order was issued by Judge Houk on September 30, 1970, authorizing the Federal Bureau of Investigation to intercept wire communications of Gerald Hay Kilgore to or from the above-described telephones for a fifteen (15) day period from the date of the installation of the device. Upon termination of this interception an extension was applied for and on October 16, 1970 Judge David W. Williams, United States District Judge, Central District of California signed an order authorizing interception of communications of the above-mentioned persons over the above-mentioned telephones for an additional fifteen (15) days. Said interception, in compliance with the order, is continuing. Since the interception began, wire communications between persons using the above-described California telephone numbers and persons using the above-described telephone numbers subscribed to by Sonia Green and Bob Green were intercepted. The nature of these

intercepted wire communications is fully described in the attached affidavit of Special Agent William E. Colombell."

The incorporated affidavit of the Special Agent of the Federal Bureau of Investigation recited the following:

"15. On October 3, 1970, at 2:13 P.M. and October 11, 1970, at 1:37 P.M., telephone calls were placed to telephone number 305-944-2984 from the state of California. These calls, as well as other calls, were lawfully intercepted pursuant to a court order signed by Judge A. ANDREW HOUK, United States District Judge, Central District of California, on September 30, 1970, authorizing the Federal Bureau of Investigation to intercept wire communications of GERALD HAY KILGORE to and from telephones 213-985-8885 and 213-985-8983 and other telephones utilized by GERALD HAY KILGORE, which telephones are located at the J. K. Sports Journal, 19548 Victory Boulevard, North Hollywood, California, in connection with the investigation of possible violation of Title 18, United States Code, Sections 1084 and 1952. Transcripts of the above telephone calls were prepared by Special Agents of the Federal Bureau of Investigation. On October 16, 1970, Judge DAVID W. WILLIAMS, United States District Judge, Central District of California, signed an order extending the authorized period of interception of the communications of the above-named persons over the above-named facilities for an additional fifteen (15) days.

16. The following is an excerpt from the transcript for the call placed on October 3, 1970, in which football and baseball "line" information is exchanged:

Person Called: Hello.
Caller: Here ya go.
Person Called: All right, just a minute now, hold on. What ya gonna start with?
Caller: Start with game number sixty-eight.
Person Called: Sixty-eight; Go ahead.
Caller: Nine and a half.
Person Called: Right.
Caller: Six and a half and thirteen.
Person Called: Right.
Caller: Seven, twenty-three.
Person Called: Right.
Caller: Seven, pick and twenty-three.
Person Called: Right.
Caller: Four twice.
Person Called: Go ahead.
Caller: Six and a half and two. Fifteen four and ten. Five and two the Saints.
Person Called: Right.
Caller: Twelve, nine, eleven, twelve and a half.
Person Called: Right.
Caller: Cincinnati game tomorrow is a pick, Merritt against Walker.
Person Called: Merritt and Walker, just a minute; ah, Walker is a pick, right? What else did he give ya?
Caller: That's it, no series price yet.
Person Called: No series price?

Caller: No, do you have one?
Person Called: What about Baltimore; looks like Baltimore's in.
Caller: Baltimore's in. I don't know, (unintelligible)

17. During this conversation the parties discuss and furnish final scores on college football games played that day. The parties terminated their call with the following conversation:

Caller: That's all I got for finals.
Person Called: All right, now listen, don't forget to call me as late as you possibly can.
Caller: I will, I will.
Person Called: Ya didn't call me last night.
Caller: The hell I, ah I know, I didn't have to, you recall.
Person Called: Ah, all right, I'll wait for your call.
Caller: I'll, I'll call ya, Okay?
Person Called: All right.
Caller: Okay, buddy.

18. The following is an excerpt from the transcript for the the call placed on October 11, 1970 in which football "line" information is discussed and one of the parties, referred to as "SAM," complains that he is not getting line information fast enough:

Person Called: Hello.
Caller: Here ya go.

Person Called: Hey, why did ya take so long? I want to know.

Caller: I just now hung up, I just got it.

Person Called: I mean why does it take them so (obscene) long for this shit.

Caller: I don't know.

Person Called: It's ridiculous.

Caller: Well, I wouldn't call and scream at him today.

Person Called: Go ahead.

Caller: Very, very bad; Notre Dame.

Person Called: I've been here all (obscene); now I've got to spend a (obscene) week in the room, with this shit — let's go.

Caller: Don't scream at me about it, SAM.

Person Called: I'm gonna call, I'm gonna get a hold of him.

Caller: Don't do it tonight, listen to what I tell you.

Person Called: Why?

Caller: It's bad.

Person Called: Okay.

Caller: It's real bad, Notre.

Person Called: (inaudible) I'm being an idiot here; — ya know, ya wanta know somethin', there's a line out already a long time ago.

Caller: Notre Dame, 13; Dartmouth, 27.

Person Called: Dartmouth 27.

Caller: Yeah.

Person Called: Let me close the door a minute. (background noise) Yeah, go ahead.

Caller: Dartmouth, 27; South Carolina 15, one five.

Person Called: Right.

Caller: Duke, 6½.

Person Called: Right.

Caller: Ohio State, 25.

Person Called: Right.

Caller: Skip; West Virginia 6½.

Person Called: Right.

19. During this conversation, the parties relate how one of their associates was hurt bad with heavy gambling losses on football and baseball games and further discuss how the bookmakers are winning all the money:

Caller: Let me explain something to you.

Person Called: Yeah.

Caller: I know that he is feuding quite a bit with the other fellow.

Person Called: They are?

Caller: Quite a bit, — a great deal they're feuding, I know that it's real, real, real bad this week, STANLEY I mean, and you never heard me say bad.

Person Called: Well, how come?

Person Called: Playin, layin, even relayed, parlayed and you know, it's bad for him, I know.

Person Called: Who's gettin the best of it?

Caller: Who's, he's, he's gettin hurt.

Person Called: He is huh?

Caller: Yeah, got hurt bad.

Person Called: I know that one day, Friday, I think it was, or something, he got hurt real bad.

Caller: Friday? With what?
Person Called: I don't know with what; I think with ah, with baseball or somethin. I don't know.
Caller: Oh, ah with the foots yesterday and today very very bad for him.
Person Called: How the hell is this, the B Ms are all for cryin.
Caller: Well I don't know, they're, they're, they're lyin to you, believe me when I tell you they're lyin to you, they ain't got no reason to cry, no reason, they won all the money in the world, the B M's.
Person Called: Jesus I don't know, alright.
Caller: Don't let em Bullshit you, I won't even listen to these (obscene) when they tell me that.
Person Called: Yeah
Caller: But I know that it's it's just treacherous, treacherous.
Person Called: Ah listen.
Caller: Yeah.
Person Called: What's with the baseball.
Caller: Oh yeah (inaudible) Mc Nally a dollar and a half over Cloninger.
Person Called: Mc Nally, one five zero.
Caller: Over Cloninger.
Person Called: Cloninger.
Caller: The series 7 to one, one to four.
Person Called: Ah, one to seven, four to one.
Caller: Right, 1 to 7, 4 to 1.
Person Called: 1 to 7 and 4 to 1, OK, ya got any scores?

Caller: Yeah, ah Giants 30 Philly 23.
Person Called: Yeah.

20. The parties then discussed final scores on recent professional football games after which the parties terminated the call.

• • •

22. All wire communications to and from the above listed telephone numbers are currently being intercepted by Special Agents of the Federal Bureau of Investigation pursuant to the Federal Court Order previously referred to in paragraph fifteen of this affidavit."

Rather than grant the petitioner a hearing on the legality of the Kilgore tap, the Court struck the foregoing quoted portions of the application and incorporated affidavit.

In discussing that procedure, the Court of Appeals created an irreconcilable conflict. On the one hand, in approving that action, it said:

"After the trial judge struck references to a prior wiretap from both the application and the affidavit, he still found that sufficient probable cause remained. . . ."

In the same Opinion, the Court said:

"Under 18 USC ¶2518(1)(e) the government's application must give 'a full and complete statement of the facts concerning all previous applications known to the individual authorizing and

making the application [to intercept] . . . communications involving any of the same persons. . . .'"

The Court never articulated how it could sanction the striking from the application that which it later said "must" be included.

In *United States vs. Giordano*, 1974, 416 U.S. 505, this Court ruled that an application for an extension under the provisions of Title 18 United States Code §2518(1)(f) must contain the results of the original application because it was "essential in law" to support the extension.

In *United States vs. Wac*, 6 Cir. 1974, 498 F.2d 1227, there was an approved application to intercept wire communications. Immediately upon the termination of that tap, there was a *new* application (as opposed to an extension) to intercept communications of not only some of the same parties, but additional parties and facilities. The first application was ruled illegal under *Giordano*. The Court of Appeals, in ordering the suppression of the results of the second application, stated:

"Though the second application in this case was not literally for an extension order since it added a new suspect and several new telephones, it was filed immediately upon expiration of the first order and related primarily to the same persons and locations. Not being an application for an extension, it was not controlled by §2518(1)(f). In this respect the present case differs from *Giordano* and it cannot be said that the results of the conversations overheard pursuant to the first order were 'essential in law' to issuance of the second order

Nevertheless, a significant portion of the supporting affidavit filed with the second application consisted of transcripts of conversations overheard and lists of calls monitored pursuant to the first order. This information was relied upon by the applicant and presumably considered by the district judge who granted the second order. While not essential in law under the circumstances of this case, we deem the results of the first order to be 'essential in fact' to the granting of the second order."

Since §2518(1) requires that the application include a full and complete statement of facts relied upon by the applicant *and* a full and complete statement of facts concerning wiretap activities of the same persons, the stricken portions were essential both in fact and in law.[2]

Green, being an aggrieved party under the provisions of Title 18 United States Code §2510(1), was entitled to a full adversary hearing on his motion to suppress. *Alderman vs. United States*, 1969, 394 U.S. 165.

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[2]See *United States vs. Bellosi*, D.C.Cir. 1974, 501 F.2d 833.

II

ASSUMING ARGUENDO IT WAS PROPER TO STRIKE ALL REFERENCE TO THE PRIOR WIRETAP, WAS THERE REMAINING PROBABLE CAUSE TO INSTALL A WIRETAP ON TELEPHONES AT THE RESIDENCE OF THE PETITIONER?

Title 18 United States Code §2518(1)(b) requires that there must be a demonstration of belief as to why *particular telephone facilities* are to be intercepted.

If all references to the Kilgore tap are stricken from the application and affidavit, there was no probable cause to believe that the telephone facilities at Green's *residence* were being used for illegal activities.

Summarizing and paraphrasing the affidavit (without reference to the Kilgore tap), it says the affiant had been an F.B.I. Agent and for sixteen months engaged exclusively in investigation of gambling activities; that he believes that interstate facilities are necessary for handicappers; that during August, September and October, 1970, informers engaged in gambling told the Agents that Green was a handicapper and furnished line information to local bookmakers; that in August and September, 1970, F.B.I. Agents observed Green in various *public telephone booths* and on several of these occasions overheard Green giving and receiving line information; that between May, 1970, and July 6, 1970, (three and one-half months before the affidavit), there were 110 telephone calls[3] from

[3]Without reference to the Kilgore tap, only the calling telephone number, the receiving telephone number and the quantity of calls would be known.

a California telephone to the telephone at the Green residence.

From these facts it would appear at most that at one time (May through July 6, 1970) there was an unusual number of long distance telephone calls from California to Green's residence which may have referred to gambling. But that information was attenuated by the intervening surveillance in August and September, 1970, from which one could only infer that Green had shifted his gambling activities from his residence to public telephones.

Therefore, the excised application would not show probable cause to believe that in October, 1970, the facilities at Green's residence were being used for the commission of an offense.

The foregoing demonstrates the correctness of the argument presented under Question I herein — that the prosecutor, investigator and the Court necessarily relied upon the information furnished by the Kilgore tap.

III

DO CONCLUSIONARY STATEMENTS OF THE INVESTIGATIVE OFFICER THAT OTHER INVESTIGATIVE PROCEDURES ARE INADEQUATE SATISFY THE REQUIREMENTS OF TITLE 18 UNITED STATES CODE §2518(1)(c)?

In an effort to comply with the requirements of Title 18 United States Code §2518(1)(c), the incorporated affidavit states as follows:

"My experience and the experience of other Agents has shown that even though gambling "customers" are identified, they are unwilling to furnish information to law enforcement agents or officials inquiring into gambling activities. This is even more true when the "customer" is a professional gambler himself and is requested to give information concerning a gambling operation. Experience has further established that even though telephone toll records are available, which indicate a person is engaged in illicit gambling, the records themselves are not sufficient to prove the gambling activities. Standard investigative techniques have not succeeded in providing evidence to sustain prosecution in this case and would succeed only to a limited degree in establishing that SAMUEL GREEN is involved in gambling activities on the telephone. Furthermore, such investigative techniques as physical surveillance and examination of the records obtainable on SAMUEL GREEN contain little probability of success in securing prosecutable evidence. Based upon my knowledge and experience as a Special Agent of the Federal Bureau of Investigation in the investigation of gambling cases and my association with other Special Agents who have conducted investigations of gambling activities, normal investigative procedures reasonably appear to be unlikely to succeed in establishing that SAMUEL GREEN is involved in gambling activities on the telephone in violation of Federal laws. My experience and the experience of other Agents have shown that gambling raids and searches of gamblers and

their gambling establishments have not in the past resulted in the gathering of physical or other evidence to prove all elements of the offenses. I have found that through my experience and the experience of other Special Agents who have worked on gambling cases, that gamblers frequently do not keep permanent records. If such records have been maintained, gamblers, immediately prior to or during a physical search, sometimes destroy these records. Additionally, records that have been seized in past gambling cases have generally not been sufficient to establish the interstate elements of Federal offenses, because such records are difficult to interpret and many times are of little or no significance without further knowledge of the gambler's activity and its interstate nature. Therefore, the interception of these telephone communications is the only available method of investigation which has a reasonable likelihood of securing the evidence necessary to prove violations of these statutes."

Although raised below, the Court of Appeals did not comment upon the sufficiency of the foregoing.

In *United States vs. Kalustian*, 9 Cir., Slip Opinion 74-3314, decided August 4, 1975, petition for rehearing filed October 14, 1975, the Court held that a similar statement was insufficient to comply with the law, and said:

"The affidavit does not enlighten us as to why this gambling case presented any investigative problems which were distinguishable in na-

ture or degree from any other gambling case. In effect the Government's position is that all gambling conspiracies are tough to crack, so the Government need show only the probability that illegal gambling is afoot to justify electronic surveillance."

This Court in *United States vs. Giordano*, 1974, 416 U.S. 505, said:

"Congress legislated in considerable detail in providing for applications and orders authorizing wire tapping and evinced the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications. These procedures were not to be routinely employed as the initial step in criminal investigation. Rather, the applicant must state that and the court must find that normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous."

In analyzing the supporting affidavit, it is patent that with a trifle investigative ingenuity and relatively little effort, the Los Angeles F.B.I. Agents who were already intercepting Kilgore's telephone calls to Green could have coordinated time and information with the Agents who were surveilling and overhearing Green in Miami. With that, there was every reasonable likelihood of a successful and untainted prosecution without wiretapping Green's home.

Instead, the investigative agents and the prosecutors did that which the opponents to wiretapping feared—the use of electronic surveillance as a routine substitute for conventional investigative techniques.

CONCLUSION

Petitioner respectfully submits that a review of the record will indicate that this Petition for Writ of Certiorari should be granted and that the Judgment of the Court of Appeals affirming the Judgment of the District Court should be set aside and the Judgment of conviction reversed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Petition for Writ of Certiorari have been furnished, Air Mail, Postage Prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530, on this 7 day of January, 1976.

E. DAVID ROSEN

APPENDIX

APPENDIX A

United States Court of Appeals,
Fifth Circuit.

No. 71-3559

UNITED STATES of America,
Plaintiff-Appellee,
v.
Gerald Hay KILGORE and Sam Green,
Defendants-Appellants.

Sept. 2, 1975.

Defendants were convicted before the United States District Court for the Southern District of Florida, at Miami, C. Clyde Atkins, J., of conspiring to violate and of violating statute prohibiting use of a facility in interstate commerce for gambling activity, and they appealed. The Court of Appeals, Goldberg, Circuit Judge, held that evidence that the Attorney General himself authorized wiretap application was sufficient, that failure to list codefendant in application as a person whose communications were to be intercepted did not invalidate the wiretap, and that application complied with statute requiring wiretap application to state facts concerning previous applications to intercept communications involving any of same persons.

Affirmed.

1. Telecommunications — 496

In absence of a statutory mandate, ordinary rules of evidence apply in resolving evidentiary question which

arises when identity of person authorizing application for wiretap is contested. 18 U.S.C.A. §§ 2516, 2516(1).

2. Criminal Law — 444

Testimony of executive assistant to Attorney General as to genuineness of Attorney General's initials on memorandum designating an assistant attorney general to exercise power to authorize application for wiretap was sufficient to admit the memorandum to prove that the Attorney General authorized the application. 18 U.S.C.A. §§ 2516, 2516(1).

3. Criminal Law — 444

Executive assistant to Attorney General was competent to prove fact that the Attorney General initialed authorization for application for a wiretap. 18 U.S.C.A. §§ 2516, 2516(1).

4. Criminal Law — 444

Memorandum which designated an assistant attorney general to exercise power to authorize application for wiretap and which was allegedly initialed by the Attorney General, and affidavit of executive assistant to Attorney General stating that the Attorney General approved request to make the application and that the initials on the memorandum were those of the Attorney General were sufficient to establish that the Attorney General himself authorized the application so as to comply with statute, and an affidavit from the Attorney General himself was not required. 18 U.S.C.A. §§ 2516, 2516(1).

5. Telecommunications — 496

Even though Government might have had probable cause to name codefendant in wiretap application which mentioned defendant and "others yet unkown" as persons whose communications were to be intercepted, failure to do so did not invalidate the wiretap, where defendants were given inventory of intercepted conversations, could listen to the tapes and were given transcripts of them, where there was no indication of bad faith by Government in its application, and where the application and affidavit specifically delineated what information the Government expected to gather from the wiretap. 18 U.S.C.A. §§ 2516, 2518(1)(b)(iv).

6. Telecommunications — 496

Statute requiring wiretap application to state facts concerning previous applications to intercept communications involving any of same persons does not require a fully detailed statement about the contents of the interception, although a judge may require such additional facts before granting an order. 18 U.S.C.A. § 2518(1)(e).

7. Telecommunications — 496

Under statute requiring wiretap application to state facts concerning previous applications to intercept communications involving any of same persons, application which indicated that Government had previously tapped codefendant's telephones in California and that this interception had produced evidence of conversations between codefendant and defendant was not inadequate on ground that it did not sufficiently detail contents of the California

interception and did not mention a Georgia interception where statement about California interception sufficiently detailed the circumstances of that wiretap, and Georgia application had been made in reference to a third party. 18 U.S.C.A. § 2518(1)(e).

Appeals from the United States District Court for the Southern District of Florida.

Before RIVES, GEWIN and GOLDBERG, Circuit Judges.

GOLDBERG, Circuit Judge:

Kilgore and Green were convicted by a jury of conspiring to violate and of violating 18 U.S.C. § 1952, which prohibits the use of a facility in interstate commerce for gambling activity. The evidence was that Kilgore had transmitted information by telephone from California to Green in Florida. Green then transmitted this information to local bookmakers. The evidence was presented at trial in the form of recordings of the conversations which had been intercepted by federal agents. The defendants had moved to suppress these recordings, alleging that there were illegalities committed in the application for the wiretap order and in its execution. After the trial judge struck references to a prior wiretap from both the application and the affidavit, he still found that sufficient probable cause remained in the application and supporting affidavit to uphold the order allowing the wiretap, that the application was sufficient in its other respects and that the wiretap had been carried out legally. On this basis he refused to suppress the evidence gathered through the interception.

Kilgore and Green appeal their conviction, alleging that their trial was illegally infected by the trial judge's refusal to suppress the recordings. We believe that the trial judge made the right decision and therefore affirm the conviction. We will limit our discussion to three issues raised by appellants, since the other points they raise are without merit.

A. *Authorization for the Application for a Wiretap:*

In *United States v. Giordano*, 1974, 416 U.S. 505, 94 S.Ct. 1820, 40 L.Ed.2d 341, and *United States v. Chavez*, 1974, 416 U.S. 562, 94 S.Ct. 1849, 40 L.Ed.2d 380, the Supreme Court said that *only* the United States Attorney General or an Assistant Attorney General may authorize a federal agent to apply to a judge for a wiretap order in order to comply with 18 U.S.C. § 2516(1), which provides that the Attorney General or an Assistant may give the authorization. A memorandum submitted by the government, allegedly initialled by then Attorney General John Mitchell, indicates compliance with this requirement in the instant case. The memorandum to an Assistant Attorney General reads in part: "Pursuant to the power conferred on me by Section 2516 of Title 18, United States Code, you are hereby specially designated to exercise that power [to authorize an application] for the purpose of authorizing William L. McCulley to make the above-described application." The Government also submitted an affidavit from Sol. Lindenbaum, the Executive Assistant to the former Attorney General, in which he says that Mitchell approved the request to make application for an interception and that the initials on the memorandum are those of Mitchell.

The appellants contend, however, that these pieces of evidence are not enough to show compliance with 18 U.S.C. § 2516(1). They try to distinguish *Chavez* on the ground that Mitchell himself submitted an affidavit there, which indicated that he had approved the application whereas here we only have an affidavit from his assistant.

[1] But the statute does not require that the At torney General both actually approve the application *and* provide the courtroom evidence that he gave the approval. Resolution of the evidentiary question which arises when the identity of the authorizing agent is contested is not covered by statutory guidelines. In the absence of a statutory mandate ordinary rules of evidence apply.

[2] It is clear that under traditional rules of evidence the testimony of Lindenbaum as to the genuineness of Mitchell's initials is sufficient to admit the Mitchell memorandum to prove that the Attorney General authorized the application:

> [I]t is generally held that anyone familiar with the handwriting of a given person may supply authenticating testimony in the form of his opinion that a writing or signature is in the handwriting of that person. Adequate familiarity may be present if the witness has seen the person write, or if he has seen writings *purporting* to be those of the person in question under circumstances indicating their genuineness. Examples of the latter situation include instances where the witness has . . . been present in an office or other place where

> genuine writings of a particular person in the ordinary course of business would naturally be seen.

McCormick on Evidence § 221 (2 ed. 1973). *See also* Federal Rule of Evidence 901(b)(2); *Paccon, Inc. v. United States*, 1968, 399 F.2d 162, 185 Ct.Cl. 24.

[3] Lindenbaum, by his status as Executive Assistant to the Attorney General established a prima facie case of familiarity with documents that the Attorney General would have initialled. His reliability was not contested by the appellants. Thus he is competent to prove the fact that Mitchell initialled the authorization. While here the verification came by way of affidavit and not direct testimony, the appellants made no objection to that procedure below.

[4] We therefore believe that the evidence that Mitchell himself authorized the application was sufficient and that the trial judge did not have to suppress the wiretap results on this basis. We note too that the same result has been reached by two other Circuits in which the evidence presented was an authorization purportedly signed by Mitchell together with a verifying affidavit from Lindenbaum. *See United States v. Brick*, 8 Cir. 1974, 502 F.2d 219; *United States v. Martinez*, 6 Cir. 1974, 498 F.2d 464.

B. *Identification of Suspect Parties in the Application:*

Appellants contend that the application to the judge for a wiretap order was deficient in that 18 U.S.C. § 2518(1)(b)(iv) was violated. That section requires that the application supply "the identity of the person, if known, committing the offense and whose communications

are to be intercepted," and also says "[e]ach order authorizing or approving the interception of any wire or oral communication shall specify—(a) the identity of the person, if known, whose communications are to be intercepted." In the present case, paragraph 3 of the application reads: "This application seeks authorization to intercept wire communications of Samuel Green and others as yet unknown concerning offenses enumerated in Section 2516 of Title 18, United States Code . . .". The appellants contend that the Government suspected that it would be intercepting communications from Kilgore but only mentioned Green and "others yet unknown".

The question of whether suspected parties aside from those whose communications are sure to be intercepted must be identified has been considered by this Court, sitting en banc. We have decided that the failure to name such an intercepted party would not invalidate the wiretap where the intercepted party was not prejudiced by the failure to be so named. In *United States v. Doolittle*, 5 Cir. 1975, 507 F.2d 1368, aff'd en banc, we said:

The wiretap authorization referred to "Billy Cecil Doolittle and others as yet unknown." Anderson and Baxter contend that the Government had reasonable cause to believe that their conversations would be intercepted. Relying on certain language in the Supreme Court's opinion in [*United States v. Kahn*, 1974, 415 U.S. 143, 94 S.Ct. 977, 39 L.Ed.2d 225] they argue that, not being "unknown," they should have been named in the authorization. They contend that since they were not named, the wiretap order was illegal as to their conversations. The same argument could be made for Sanders. We reject this argument. The defendants neither allege nor demonstrate any prejudice to them in not being named in the authorization. The Government contends that its agents had personal knowledge, as opposed to information, to support probable cause as to illegal activity only of Doolittle, the co-owner of the Sportsman's Club, the establishment wherein the telephones were located and to which the telephone bills were sent. All defendants received an inventory of the intercepted conversations, were allowed to listen to the tapes and received transcripts of the conversations prior to use against them at trial, as if they had been named in the order. Most of the conversations of each defendant were with Doolittle, the person named in the order. There is no indication of bad faith or attempted subterfuge by the Government in its wiretape application. The application and affidavit delineated specifically the information expected to be gathered from the tap. We hold there was substantial compliance with the requirements of the Act, and that the failure to name other defendants does not render the evidence obtained as to them inadmissible under 18 U.S.C.A. § 2518(10) (a).[1]
507 F.2d at 1371-72 (footnote added).

[5] Here, too, defendants were given an inventory of intercepted conversations, could listen to the tapes and were given transcripts of them. In the recorded conversations at issue, Kilgore spoke to Green, who was named in the wiretap order. There is no indication of bad faith by the Government in its application. The Government here may have had probable cause to name Kilgore in the application, but the Government had probable cause as to the unnamed defendants in *Doolittle*—though by informa-

[1]Section 2518(1) (a) is the section which gives standing to a party claiming to be aggrieved to challenge alleged violations on the previous statutory sections, including § 2518(1) (b) (iv).

tion rather than personal knowledge—and yet there we upheld an application which did not mention these other defendants. Finally, the application and the affidavit specifically delineated what information the Government expected to gather from the wiretap. This issue therefore falls squarely in the shadow of the resolution in *Doolittle* and provides no grounds for reversal.

C. *Identification of Previous Wiretaps in the Application:*

[6, 7] Under 18 U.S.C. § 2518(1)(e) the government's application must give "a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application [to intercept] . . . communications involving any of the same persons . . .". In the present case the application indicated that the Government had previously tapped Kilgore's telephones in California and that this interception had produced evidence of conversations between Kilgore and Green. Appellants contend that the application did not sufficiently detail the contents of the California interception and did not mention at all a Georgia interception in which conversations between a third party and Kilgore had been picked up. The short answer to this complaint is that the statute does not require what the appellants say is lacking. The application must give a statement of the facts about all previous applications involving the same parties. Here the statement about the California interception sufficiently detailed the circumstances of that wiretap and disclosed that conversations with Green were overheard. The statute does not require a fully detailed statement about the contents of the interception although, of course, a judge may require such additional facts before granting

an order. There was no statement about the Georgia interception, but that interception only peripherally involved Kilgore. The Georgia application was made in reference to a third party without cause to believe Kilgore would also be overheard. During the course of intercepting that party's communications, agents heard some of his conversations with Kilgore. In the Georgia application the Government did not apply to intercept communications of the same persons—rather it applied to intercept conversations of a third party.

The conviction is therefore affirmed.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1974

No. 71-3559

D. C. Docket No. 71-376-CR-CA
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

GERALD HAY KILGORE and SAM GREEN,
Defendants-Appellants,

Appeals from the United States District Court for the Southern District of Florida

Before RIVES, GEWIN and GOLDBERG, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

September 2, 1975

Issued as Mandate:

APPENDIX C

United States Court of Appeals,
Fifth Circuit.

No. 71-3559.

UNITED STATES of America,
Plaintiff-Appellee,
v.

Gerald Hay KILGORE and Sam Green,
Defendants-Appellants.

Dec. 12, 1975.

Defendants' convictions in the United States District Court for the Southern District of Florida, C. Clyde Atkins, J., were affirmed by the Court of Appeals, 518 F.2d 496, and defendants filed petition for rehearing. The Court of Appeals held that the Government's failure to identify one defendant in an application for electronic surveillance of the other defendant was not done in bad faith and did not prejudice defendant; and that the district court was not clearly erroneous in concluding that defendant received an inventory of the surveillance conducted in time prior to trial.

Petitions denied.

1. Telecommunications — 493

Even if defendant's conversations had previously been monitored in unlawful electronic surveillance of codefend-

ant, defendant was not thereby immunized from future electronic surveillance.

2. Criminal Law — 394.3
Telecommunications — 496

Government's failure to identify in electronic surveillance application person other than individual who was target of criminal investigation, despite fact that Government knew that that person's conversations would likely be intercepted, was not evidence of Government's bad faith requiring suppression of intercepted conversations as against that person, in view of fact that government attorney believed in good faith that such identification was not statutorily required. 18 U.S.C.A. § 2518.

3. Telecommunications — 496

Where person other than defendant was target of electronic surveillance application and defendant's conversations would have been overheard no matter how much judge who approved application minimized surveillance, Government's failure to name defendant in electronic surveillance application, in order to allow judge to consider whether surveillance of defendant was warranted in light of prior surveillance of which defendant was target, did not prejudice defendant, particularly in view of good faith doubt which might have existed with regard to previous taps on defendant which could have caused judge to approve yet another tap on him. 18 U.S.C.A. § 2518.

4. Telecommunications — 493

Under Omnibus Crime Control and Safe Streets Act of 1968, requirement that electronic surveillance be "necessary" refers not to the person whose conversations are to be intercepted, but rather to facts which make wiretapping necessary because of the nature of the particular crime involved. 18 U.S.C.A. § 2518(1)(c), (3)(c).

5. Criminal Law — 1158(2)

District court was not clearly erroneous in concluding that defendant received inventory of electronic surveillance to which he was party in time prior to trial. 18 U.S.C.A. § 2518.

Appeals from the United States District Court for the Southern District of Florida.

On Petitions for Rehearing and Petitions for Rehearing En Banc

(Opinion, Sept. 2, 1975, 5 Cir., 1975, 518 F.2d 496)

Before RIVES, GEWIN and GOLDBERG, Circuit Judges.

PER CURIAM:

[1] Both Kilgore and Green have filed petitions for rehearing, urging this Court to reconsider its affirmance of their convictions. We find nothing in Green's petition that would require a different result, nor does Kilgore's petition disturb our holding that the electronic surveillance

of Green's telephone was legal.[1] Kilgore raises several points that merit discussion, however, with regard to the admissibility of the evidence from the Green tap against him.

Two questions are presented here for our reconsideration: whether the district court gave an adequate evidentiary hearing on the question of the Government's alleged bad faith in not naming Kilgore in the Florida application, and whether Kilgore was prejudiced in any way by the Government's failure to name him. Unless Kilgore can show either bad faith or prejudice, his claims are foreclosed by our decision in *United States v. Doolittle*, 5 Cir., (en banc) 1975 518, F.2d 500 *affirming* 507 F.2d 1368. In *Doolittle*, there was substantial compliance with the inventory provisions of section 2518(9), no demonstrated prejudice to the defendants and no indication of bad faith on the Government's part. Under those circumstances, the fact that the wiretap authorization did not name the defendants, even though they were actually known to the Government, did not require suppression of the evidence gathered in the tap against them.[2] Thus, constrained as we are to follow the law of this Circuit, Kilgore must show that he is not within *Doolittle* before we would be able to grant him relief.

[1]We would like to make one point clear at the outset. Even if the Government had conducted illegal wiretaps on Kilgore in the past, Green would not be immunized from surveillance. If Green could take advantage of Kilgore's past experiences, the Government would effectively be precluded from investigating anyone who had been tapped before. We cannot believe that Congress intended this result. Thus, the greatest relief to which Kilgore would be entitled would be suppression of the evidence from the Green tap.

[2]*But see United States v. Donovan*, 6 Cir. 1975, 513 F.2d 337, petition for cert. filed, 44 U.S.L.W. 3164 (U.S. Sept. 30, 1975) (No. 75-212); *United States v. Bernstein*, 4 Cir. 1975, 509 F.2d 996, petition for cert. filed, 43 U.S.L.W. 3637 (U.S. May 27, 1975) (No. 74-1486).

Some additional facts are necessary to place our consideration of Kilgore's allegations in perspective. As our first opinion indicated, the Florida application to tap Green's telephone named only Green and "others yet unknown" in paragraph 3, which listed the persons whom the Government sought to intercept. Paragraph 5 represented that no previous applications had been filed to intercept any of the "known persons," communications—in other words, Green's. However, paragraph 5 went on to reveal that a previous application had been made to tap Kilgore's telephone in California, and that Green had been intercepted pursuant to that authorization. Nowhere did the application mention one prior Georgia wiretap and several prior California wiretaps in which Kilgore had been overheard. Kilgore now alleges that the Government's failure to name him in its Florida application for a tap on Green constituted bad faith on its part and operated to his prejudice. According to his allegations, the Government's motive in failing to name him was to avoid the necessity of revealing the prior wiretaps that involved him. Had these taps been disclosed, he argues, the judge who passed on the Florida application would have found it unnecessary as to him, both as an evidence-gathering mechanism and in terms of the statute's minimization directive. Furthermore, Kilgore argues that the prior California wiretap mentioned in the Florida application was illegal and that evidence from this illegal tap tainted the Florida application.

Recognizing the fact that Kilgore's allegations raised serious questions about the Florida tap, the district court ordered an evidentiary hearing on its validity in connection with Kilgore's motion to suppress. He refused to include within the scope of this hearing any consideration of the prior wiretaps on Kilgore. At the hearing, he acknowledged that some question existed about the legality of the California tap. As a cautionary measure, therefore, he struck all references to the California tap that went to the question of probable cause to tap Green. On the basis of the remaining information, he decided that sufficient probable cause still existed to support the tap on Green's telephone.[3] Defendants' challenge to this finding is without merit. Thus, after the district court's curative action, the Florida application was valid on its face. Unless the Government had procured it in bad faith, or unless Kilgore was prejudiced by the omission of his name, *Doolittle* would support the court's denial of the motion to suppress. The narrow question before us is whether the evidentiary hearing was sufficient to answer these questions, or whether we should remand this case for further proceedings.[4]

[2] 1. *Was the Government in bad faith when it did not name Kilgore?* The first question we must meet is

[3]*United States v. Giordano*, 1974, 416 U.S. 505, 94 S.Ct. 1820, 40 L.Ed.2d 341, does not disapprove this procedure. *Giordano* holds that a judge may not disregard the results of a tainted original tap when he is considering the validity of an *extension*, since that procedure would be a direct violation of 18 U.S.C. § 2518(1)(f). However, we agree with Justice Powell's characterization of the majority opinion where he states that it casts no doubt on the proposition that the independent source rule is fully applicable to original orders. See 416 U.S. at 517 n. 7, 94 S.Ct. at 1827 n. 7, 40 L.Ed.2d at 378 n. 7.

[4]We note that since the court did not have the benefit of our decision in *Doolittle*, the issues were not framed as precisely as they might have been.

that of the Government's motive in not naming Kilgore in its application. From a reading of the record at the hearing on the motion to suppress, we see that the court did consider this question. The testimony of the Government's attorney who prepared the application frankly reflects his belief that it was unnecessary to name Kilgore for a surveillance whose purpose was primarily to intercept Green. In cross-examination, Kilgore's attorney clearly pointed out the statutory requirement of naming the persons whose communications were to be intercepted. Since the district court decided to deny the motion to suppress, he must have found implicitly that the Government was not in bad faith when it omitted Kilgore's name. Surely if he had agreed that the Government was deliberately disobeying the statute, he would have delved further into the question.[5] Thus the legality of the Florida application was not tainted by bad faith in failing to name Kilgore, and the first premise of *Doolittle* is satisfied.

[3, 4] 2. *Was Kilgore prejudiced by the absence of his name?* The second prerequisite which must be met before we can apply *Doolittle* to this situation is the lack of prejudice to Kilgore. The question is this: Would the district judge who approved the Florida application have placed any additional limitations on the use of the evidence or on the surveillance conducted if Kilgore's name and the prior wiretaps had been disclosed? We think the answer to this question must be no, regardless of the details of the prior taps involving Kilgore. First, disclosure

[5]We note that a question which later found the Fourth and Sixth Circuits on one side and the Fifth on the other—that is, who must be named in an application—cannot be said to be so simple that the Government was in bad faith to adopt one interpretation of the statute over another. Furthermore, we may not disturb a credibility finding such as this unless it is clearly erroneous.

of Kilgore's name would not have affected the existence of the tap on Green, for as the Government stated, the tap was necessary for their investigation of Green. Kilgore argues that the Florida tap was not "necessary" for him; however, we think that the necessity requirement of section 2518(1)(c) and (3)(c) refers to the technique used, which relates in turn to the nature of the crime. His main point, then, is that the statute's requirement that electronic surveillance be minimized was violated. The rationale behind this requirement dictates that the Government agents conducting the surveillance not listen to conversations that do not relate to the criminal activity that is the focus of the investigation. It also requires minimization of the number of days or weeks of surveillance.[6]

Here, the agents literally could not have listened to Green's conversations related to the criminal activity without also listening to Kilgore. Thus, no matter how much the approving judge minimized the surveillance, Kilgore would have been overheard. Additionally, some good faith doubt may have existed with regard to the previous taps on Kilgore which would have caused the judge to approve yet another tap on him. Finally, this was not a case where the tap on Green was just an underhanded way to tap Kilgore; witnesses testified, and the district court found, that Green was the primary target of this tap. We conclude from all the circumstances that Kilgore was not prejudiced by the omission of his name from the Florida application.

[6]The legislative history indicates that Congress wanted to insure that the showing of probable cause would not become stale because of governmental delay. *See* S.Rep.No. 1097, 90th Cong., 2d Sess. (1968) (1968 U.S. Code Cong. & Admin.News at p. 2192). In this case, the surveillance lasted only seven days.

[5] *Doolittle* also sets up a third prerequisite to its application: the defendant must receive an inventory of the surveillance conducted prior to the trial. Though some dispute exists on this point, we find that the district court was not clearly erroneous in concluding that Kilgore did receive the inventory in time.

Since we find that the three premises upon which our *Doolittle* holding was based were all satisfied here, the district court was correct in ruling that the evidence from the Green tap could come in against Kilgore despite the fact that Kilgore was not named in the application. Under the circumstances, a separate evidentiary hearing on the prior surveillances involving Kilgore was not necessary.[7]

Except as modified herein, we adhere to our original opinion and deny the petitions for rehearing.

The Petitions for Rehearing are denied and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petitions for Rehearing En Banc are denied.

Denied.

[7]Our finding that these prior taps on Kilgore were irrelevant to the Green application moots the dispute whether Kilgore was a central figure in the Georgia tap or whether he was only peripherally involved, as we found in our first opinion. Had we found prejudice to Kilgore, a hearing would have been necessary in order to decide whether the evidence from the Green tap should have been suppressed. *See* § 2518(10).

We note that the hearing the court did hold was absolutely necessary, given the allegations in Kilgore's motion to suppress. If he had refused to investigate the legality of the Florida application, we would have been forced to remand this case to him for further consideration.

Supreme Court, U. S.
FILED
APR 6 1976
MICHAEL RODAK, JR., CLERK

Nos. 75-962 and 75-963

In the Supreme Court of the United States

OCTOBER TERM, 1975

SAM GREEN, PETITIONER

v.

UNITED STATES OF AMERICA

GERALD HAY KILGORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-962

SAM GREEN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 75-963

GERALD HAY KILGORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The initial opinion of the court of appeals (Pet. No. 75-963, App. A) is reported at 518 F.2d 496. A supplementary opinion denying petitions for rehearing (Pet. No. 75-963, App. B) is reported at 524 F.2d 957.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 1975. A petition for rehearing was denied on December 12, 1975. The petitions for a writ

of certiorari were filed on January 8, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court erred in refusing to conduct an evidentiary hearing on the legality of a prior wire interception in which petitioners had been overheard, where the information obtained by the prior interception was not used to establish probable cause for the present interception.

2. Whether the affidavit and application for the interception order in this case contained sufficient evidence, independent of evidence secured through prior wire interceptions, to establish probable cause for the interception order. (Petitioner Green)

3. Whether the application for the interception order sufficiently established that other investigative procedures were inadequate. (Petitioner Green)

4. Whether the application for the interception order should have identified petitioner Kilgore as one whose communications were to be intercepted, and, if so, whether evidence obtained pursuant to the order should be suppressed as to him. (Petitioner Kilgore)

5. Whether the application for the interception order sufficiently set forth information concerning prior applications for interceptions, and whether an evidentiary hearing was necessary on this issue. (Petitioner Kilgore)

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, each petitioner was convicted on twelve counts charging use of interstate telephone facilities to carry on an illegal gambling operation, in violation of 18 U.S.C. 1952, and on one count of conspiring to commit those offenses, in violation of 18 U.S.C. 371. Petitioner Green was sentenced to concurrent terms of two years' imprisonment. Petitioner Kilgore was sentenced to concurrent terms of three years' imprisonment. The court of appeals affirmed (Pet. No. 75-963, App. A)[1] and denied rehearing in a supplemental opinion (Pet. App. B).

The evidence adduced at trial established that petitioner Kilgore transmitted line information by interstate telephone from California to petitioner Green in Florida, who supplied the information to local bookmakers. This evidence was derived primarily from a court-authorized wire interception of two telephones located in Green's residence in Florida.

ARGUMENT

1. Included in the affidavit (C.A. Ex. Vol., pp. 9-26)[2] submitted in support of the government's application for the wire interception order in this case were excerpts from transcripts of several conversations between petitioners Kilgore and Green that had been recorded during a previous court-authorized wire interception of telephones used by Kilgore in California. Petitioners contend (Pet. No. 75-962, pp. 7-17; Pet. No. 75-963, pp. 16-18) that the district court erred in refusing to hold an evidentiary hearing to determine whether the wire interception evidence in this case was tainted by the alleged illegality

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[1] All further "Pet. App." references are to the petition in No. 75-963.

[2] "C.A. Ex. Vol." refers to the exhibit volume filed in the court of appeals. "C.A. App." refers to the appendix filed in the court of appeals.

of the previous interception of telephones in California.[3] At a pretrial hearing, however, the district court found that there was sufficient evidence contained in the affidavit, even without the evidence derived from the California interception, to establish probable cause for the interception in this case (C.A. App. 27). As we show in point 2, *infra*, this conclusion of the district court was manifestly correct, and accordingly the district court properly determined that there was no need for an evidentiary hearing on the legality of the California interception. See *United States* v. *McHale*, 495 F.2d 15, 17-18 (C.A. 7); *United States* v. *Sterling*, 369 F.2d 799 (C.A. 3); *Clay* v. *United States*, 246 F.2d 298, 304 (C.A. 5), certiorari denied, 355 U.S. 863.[4]

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[3]Petitioner Kilgore's contention that the district court should have held an evidentiary hearing apparently encompasses the broader claim that the hearing should have inquired into whether his name was improperly omitted from applications for other interceptions in California and for a previous interception conducted in Georgia, during which conversations of his were intercepted, and whether those interceptions should have been mentioned in the application in the instant case (see Pet. No. 75-963, pp. 12-16). We respond to this issue *infra*, pp. 12-14.

[4]Contrary to petitioner Green's assertion (Pet. No. 75-962, pp. 16-17), the instant case does not conflict with *United States* v. *Giordano*, 416 U.S. 505, or *United States* v. *Wac*, 498 F.2d 1227 (C.A. 6). The result in *Giordano* clearly turned upon the fact that the order there under consideration involved an *extension* of an improperly authorized initial application; the Court held that consideration of the prior interception was "essential • • • in fact and in law" to the authorization of the extension (416 U.S. at 533). Nor is this case like *Wac*, where the court found that consideration of evidence derived from a prior interception was "essential in fact" for the granting of an original application (498 F.2d at 1231); to the contrary, here the court specifically determined that

2. Petitioner Green asserts that, contrary to the conclusions of the courts below, the facts set forth in the affidavit (independent of the results of the California interception) were insufficient to establish probable cause for the wire interception order (Pet. No. 75-962, pp. 18-19). Green does not dispute that the independent evidence was sufficient to establish probable cause to believe that he was receiving and transmitting gambling information in violation of 18 U.S.C. 1952, or to believe that particular communications concerning that offense would be obtained through wire interception, as required by 18 U.S.C. 2518(3)(a) and (b). He argues, however, that the independent evidence was insufficient to establish probable cause as to the specific telephones that were monitored, as required by 18 U.S.C. 2518(3)(d).

Section 2518(3)(d) provides that the judge issuing the interception order must find, on the basis of the facts submitted, that

> there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

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the wire interception order was supported by independent probable cause.

Similarly, the court's refusal to grant Green an evidentiary hearing on the legality of the California wire interception mentioned in the application does not create a conflict with *United States* v. *Bellosi*, 501 F.2d 833 (C.A. D.C.), which involved the government's failure to inform the authorizing judge that one of the targets of the proposed interception had been the target of a previous application. That case did not involve the question whether and under what circumstances an evidentiary hearing would be required in connection with the alleged illegality of previous wire interceptions that the government did bring to the attention of the authorizing judge.

The independent information in the affidavit showed that petitioner Green had been receiving and disseminating gambling information, that the two telephones sought to be intercepted were located in his residence, that the telephones were listed in the names of members of his family and were billed to him, and that in a sixty day period over 110 long distance telephone calls were made from California to the two telephones sought to be intercepted (C.A. Ex. Vol., pp. 9-15, 23). As petitioner himself concedes (Pet. No. 75-962, p. 19), the evidence of these calls showed that "there was an unusual number of long distance telephone calls from California to Green's residence which may have referred to gambling." Coupled with the other independent evidence of Green's participation in gambling activities, this was sufficient to meet the requirements of 18 U.S.C. 2518(3)(d).

3. Petitioner Green argues further that the monitored conversations should have been suppressed because the intercept application failed sufficiently to establish the inadequacy of other investigative procedures (Pet. No. 75-962, pp. 19-23).

18 U.S.C. 2518(1)(c) requires that each application for an order authorizing the interception of wire or oral communications shall include, *inter alia*,

> a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous * * * .

Similarly, a finding by the issuing judge that alternative investigative procedures are inadequate is a prerequisite for the issuance of an order authorizing electronic surveillance. 18 U.S.C. 2518(3)(c).

Pertinent decisions have stated, with only minor variation in particulars, the test to be employed in evaluating the nature of the showing required by 18 U.S.C. 2518(1)(c).[5] These decisions teach, in sum, that the requirement of Section 2518(1)(c) is satisfied when—viewing the affidavit in a practical and common sense fashion—a sufficient factual basis is shown from which the issuing authority can reasonably conclude that electronic surveillance is necessary to obtain evidence for the successful prosecution of persons known to be involved in the criminal activities under investigation, or is necessary to ascertain the full scope of such criminal activities and the identity of the participants therein. See *United States* v. *Turner*, 528 F.2d 143, 152 (C.A. 9), certiorari denied *sub nom. Grimes* v. *United States*, December 1, 1975, No. 75-5330. In making this determination, the issuing judge must consider the type of illegal activity under investigation and the extent to which telephonic communications are involved therein. *United States* v. *Bobo*, 477 F.2d 974 (C.A. 4). He should also weigh the opinions and conclusions of experienced investigators in determining whether to authorize the wire interception. *In re Dunn*, 507 F.2d 195, 197 (C.A. 1). In short, considerable discretion rests with the issuing judge in determining whether the interception is necessary (*United States* v. *Smith*, 519 F.2d 516, 518 (C.A. 9)), and

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[5] *E.g.*, *United States* v. *Armocida*, 515 F.2d 29, 37-38 (C.A. 3), certiorari denied *sub nom. Conti* v. *United States*, October 6, 1975, No. 74-6683; *In re Dunn*, 507 F.2d 195, 197 (C.A. 1); *United States* v. *Robertson*, 504 F.2d 289, 293 (C.A. 5), certiorari denied, 421 U.S. 913; *United States* v. *Brick*, 502 F.2d 219, 224 (C.A. 8); *United States* v. *James*, 494 F.2d 1007 (C.A. D.C.), certiorari denied *sub nom. Jackson* v. *United States*, 419 U.S. 1020; *United States* v. *Pacheco*, 489 F.2d 554, 565 (C.A. 5), certiorari denied, 421 U.S. 909; *United States* v. *Curreri*, 388 F. Supp. 607, 618-622 (D. Md.), and cases cited therein.

his determination should be accorded substantial weight by the reviewing court (cf. *Jones* v. *United States*, 362 U.S. 257, 270-271).

Assessed against the foregoing standards, the information provided in the affidavit in support of the application here was ample to support the finding of the issuing judge that "normal investigative procedures * * * reasonably appear to be unlikely to succeed * * * or [are] too dangerous." In brief, it was shown in the affidavit that several months of investigation involving the use of confidential informants and visual surveillance had not revealed the scope of Green's operation or fully established that petitioner Green was disseminating the line information he received from petitioner Kilgore to local bookmakers. The affiant further stated that, on the basis of his experience, testimony could not often be obtained from "customers" involved in gambling cases, telephone toll records would be insufficient to prove the offense, standard investigative techniques, such as surveillance, would be inadequate to develop evidence of the offense since the business was carried on by telephone, and searches to obtain gambling records were unlikely to succeed because of the infrequency with which such records were maintained and the difficulty in both obtaining and interpreting any such records when they were maintained (C.A. Ex. Vol., pp. 23-25).

This information sufficiently established the need for electronic surveillance to satisfy the requirements of Section 2518(1)(c). That section "is simply designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." *United States* v. *Kahn*, 415 U.S. 143, 153, n.12. "Congress * * * did not attempt

to require 'specific' or 'all possible' investigative techniques before orders for wire taps could be issued. * * * '[T]he statute does not require the government to use a wire tap only as a last resort.' " *United States* v. *Smith, supra,* 519 F.2d at 518; *United States* v. *Kerrigan,* 514 F.2d 35 (C.A. 9), certiorari denied, November 3, 1975, No. 74-1629.[6]

It is possible that a conflict is emerging between the Ninth Circuit and other courts of appeals that have considered the question of the showing required by Section 2518(1)(c). Should such a conflict clearly develop, we believe the issue would probably be of sufficient importance to justify resolution by this Court. At the present time, however, there appears to be internal inconsistency within the Ninth Circuit regarding the issue, and there are pending requests for *en banc* consideration by that court. Accordingly, we believe that the question is presently not ripe for consideration by this Court.[7]

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[6]The legislative history confirms the conclusion that the provisions of 18 U.S.C. 2518(1)(c) were not intended to frustrate the use of wire interception as a valid investigative tool by requiring an unreasonably stringent showing of need:

> Merely because a normal investigative technique is theoretically possible, it does not follow that it is likely. [Citations omitted.] What the provision envisions is that the showing be tested in a practical and common-sense fashion.

S. Rep. No. 1097, 90th Cong., 2d Sess., p. 101 (1968).

[7]A panel of the Ninth Circuit in *United States* v. *Kalustian*, No. 74-3314, decided August 4, 1975, opinion amended, December 11, 1975, petition for rehearing with suggestion for rehearing *en banc* filed October 14, 1975, appears to have imposed more stringent requirements for the showing under 18 U.S.C. 2518(1)(c) than Congress intended, or than have been required by any of the courts that have previously interpreted that section. A similar result was recently reached by a panel of the Ninth Cir-

4. Petitioner Kilgore contends that the evidence derived from the wire interception in this case should have been suppressed because the intercept application and order did not name him as a person "known" to be committing the offense although the government had probable cause to believe that his conversations would be overheard. He relies on 18 U.S.C. 2518(1)(b)(iv), which provides that the application should include "the identity of the person, if known, committing the offense and whose communications are to be intercepted."

The question whether Section 2518(1)(b)(iv) requires the government to identify in the application for the intercept order all those who it has probable cause to believe will be overheard using the telephone in the commission of the described offense is presented in *United States* v. *Donovan*, No. 75-212, certiorari granted, February 23, 1976. In *Donovan*, we argue that the person who must be identified if known is the individual who leases or commonly uses the telephone being monitored, that is, the primary target of the interception.[8]

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cuit in an unpublished order in *United States* v. *Gross*, No. 75-2376, decided February 19, 1976, petition for rehearing with suggestion of rehearing *en banc* pending; and in *United States* v. *Pezzino*, No. 75-2305, decided January 23, 1976, petition for rehearing with suggestion of rehearing *en banc* pending, the panel followed the *Kalustian* test in finding that the affidavit in that case did satisfy the requirements of Section 2518(1)(c). Other panels of the Ninth Circuit have not imposed requirements as stringent as those used in *Kalustian*. See *United States* v. *Smith*, *supra*; *United States* v. *Turner*, *supra*. There is at least one other case presently pending before the Ninth Circuit involving the same issue. *United States* v. *Pulliam*, No. 75-1383.

[8]We are sending petitioners a copy of our petitions in *Donovan* and *United States* v. *Bernstein*, No. 74-1486 (to which the *Donovan* petition refers).

Under that rationale, it was proper in this application and order to identify only Green as the person whose communications were to be intercepted. He was the prime target who was known to be committing the substantive offenses under investigation by means of the telephone to be intercepted. Although Kilgore was a person with whom Green could be expected to discuss his illegal activities on the intercepted telephone, that fact does not require that Kilgore be named in the application and order. His position in this respect is the same as that of those persons who were not named in the applications for the interceptions in *Donovan*, who also might have been expected to engage in conversations with the named target over the intercepted telephone line.

In any event, Kilgore was identified in the affidavit supporting the application, which was incorporated by reference into the application itself. The affidavit clearly set out the information the government possessed regarding his participation in the offense being investigated and informed the issuing judge of the probability that Kilgore would be overheard during the intercept. Therefore, by incorporating the information contained in the affidavit, the application satisfied the reading of Section 2518(1)(b)(iv) urged by petitioner and adopted by the court of appeals in *Donovan*. Cf. *United States* v. *Manfredi*, 488 F.2d 588, 598 (C.A. 2), certiorari denied, 417 U.S. 936.[9]

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[9]We recognize that, since the application named Kilgore but the order did not, the order technically failed to comply with 18 U.S.C. 2518(4)(a) if the naming of Kilgore was required by the statute. But where an individual is identified in the application, the omission of his name from the order is not a defect justifying suppression, since no congressional policies have been defeated by

For the foregoing reasons and those contained in our *Donovan* petition, we submit that the court below incorrectly assumed that the application failed to comply with the requirements of 18 U.S.C. 2518(1)(b)(iv). But we also submit that it was correct in holding that, if there was such a failure, it did not warrant suppression.

Nevertheless, since the issue whether the failure to identify a known person in an intercept order is grounds for suppression is pending in *Donovan*, this Court may wish to hold No. 75-963 (Kilgore's petition) until it has acted on that case. If the Court concludes in *Donovan* that a failure to name a known person warrants suppression of his intercepted conversations, Kilgore's claim should be remanded to the court of appeals to determine whether there was such a failure as to him.

5. 18 U.S.C 2518(1)(e) provides that each application for an interception order shall include:

> a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval

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the omission, and the defendant has not been prejudiced thereby. Cf. *United States* v. *Cirillo*, 499 F.2d 872, 878-880 (C.A. 2), certiorari denied, 419 U.S. 1056. Thus the omission of the identity of Kilgore from the intercept order, where it was set out in the application incorporating the affidavit, is not the sort of violation of a statutory requirement that would render the interception unlawful, and hence suppressible, under 18 U.S.C. 2518(10)(a)(ii). *United States* v. *Giordano*, 416 U.S. 505, 527; *United States* v. *Chavez*, 416 U.S. 562, 575-580. Nor would suppression be required under traditional Fourth Amendment doctrines, since no constitutional rights were violated. The Fourth Amendment does not require that a warrant name the person whose "things [are] to be seized." *Berger* v. *New York*, 388 U.S. 41, 58-59. The things to be seized in this case were, of course, gambling conversations, which were particularly described in the order (C.A. Ex. Vol., pp. 27-31).

> of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application * * * .

Relying on this provision, petitioner Kilgore argues (Pet. No. 75-963, pp. 12-16) that the evidence from the surveillance of petitioner Green's telephone should have been suppressed because the government did not mention all of the previous wire interceptions of Kilgore's conversations and that he was entitled to an evidentiary hearing on this issue.[10]

If our position in *Donovan* is correct, however, then it was unnecessary to name Kilgore in the interception application in this case and his argument must fail, since the disclosure requirement of Section 2518(1)(e) extends only to "previous applications * * * involving [the] persons * * * *specified in the application*" (emphasis added).

If, on the other hand, the Court rejects our arguments in *Donovan*, then this case should be remanded with respect to petitioner Kilgore for a determination whether the government failed in the instant application to mention any previous applications in which Kilgore

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[10]Kilgore was not named in the applications for other interceptions in Georgia and California during which conversations of his were overheard. His argument that he was improperly denied an evidentiary hearing on the legality of all previous interceptions apparently includes, in addition to the claim raised by petitioner Green with respect to the California interception mentioned in the application (pp. 3-4, *supra*), the complaint that he was thereby precluded from proving "that he was a known but unidentified target in Georgia" (Pet. No. 75-963, p. 14).

should have been named, and for the further determination of the appropriate remedy in the event such a failure is found to have occurred.[11]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari in No. 75-962 should be denied and that action on the petition in No. 75-963 should be deferred and the petition disposed of in light of the decision in *Donovan*.

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[11]These determinations will be necessary, of course, only if we are correct in our assertion that the inclusion of Kilgore in the government's affidavit satisfied any naming requirement that the Court in *Donovan* might hold applies to applications in general.